

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

GERALD T. BROWN)	
Claimant)	
VS.)	
)	
)	Docket Nos. 133,155,
ESSEX GROUP, INC.)	133,156 & 150,151
Respondent)	
AND)	
)	
LIBERTY MUTUAL INSURANCE COMPANY)	
(DOCKET NO. 133,156))	
Insurance Carrier)	
AND)	
)	
TRAVELERS INSURANCE COMPANY)	
(DOCKET NOS. 133,155 AND 150,151))	
)	
AND)	
)	
THE KANSAS WORKERS COMPENSATION FUND)	

ORDER

Claimant, respondent and Travelers Insurance Company and the Kansas Workers Compensation Fund appeal from an Award entered by Administrative Law Judge James R. Ward dated March 17, 1994.

APPEARANCES

The claimant appeared by his attorney, John J. Bryan of Topeka, Kansas. The respondent and insurance carrier, Liberty Mutual Insurance Company, appeared by their attorney, James C. Wright of Topeka, Kansas. The respondent and insurance carrier, Travelers Insurance Company, appeared by their attorney, Bret C. Owen of Topeka, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, James B. Biggs of Topeka, Kansas.

RECORD

The record for these three docketed claims consists of the transcripts of the Regular Hearing, held July 19, 1993; the Continuation of Regular Hearing, held September 24, 1993; depositions of Clarissa Brown, taken July 8, 1993; Nathan Shechter, M.D., taken July 20, 1993; John Gaska, taken September 3, 1993; Daniel D. Zimmerman, M.D., taken September 24, 1993; and William Powell, M.D., taken November 12, 1993.

Docket No. 133,156

STIPULATIONS

1. Claimant met with personal injury by accident September 13, 1985.
2. Claimant's accidental injury arose out of and in the course of his employment with the respondent.
3. Respondent had notice of accidental injury.
4. The relationship of employer and worker existed on the date of the accident.
5. The parties are covered by the Kansas Workers Compensation Act.
6. Liberty Mutual Insurance Company had the workers compensation insurance coverage for Essex Group through October 1, 1986.
7. Claimant was paid temporary total disability compensation for six (6) days, at the rate of \$173.88 per week, in the sum of \$149.04, through September 26, 1985. No additional dates of temporary total are claimed and no temporary partial disability compensation is claimed.
8. Medical treatment was furnished in connection with this accident, in the sum of \$2,115.40.

ISSUES

Claimant appeals seeking review of the following issues:

- (1) Nature and extent of disability.
- (2) Average weekly wage.
- (3) The assessment of one-third ($\frac{1}{3}$) of the costs against the claimant.

The respondent and Travelers Insurance Company and the Kansas Workers Compensation Fund appeal and seek review of nature and extent of disability and any resulting credit pursuant to K.S.A. 44-510a (Ensley). At oral argument on this matter the following issues were also raised by respondent: Timely written claim, timely application for hearing and Fund liability. Issues which were presented for determination by the Administrative Law Judge but for which review is not sought include: Medical mileage, future medical and unauthorized medical allowance. Therefore, the findings by the Administrative Law Judge on these issues will be approved and adopted by the Appeals Board as its own.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the review of the entire record, including transcripts of the Regular Hearing, depositions and briefs of the parties, the Appeals Board finds as follows:

- (1) Written claim was timely made. The parties stipulated that claimant met with personal injury by accident arising out of and in the course of his employment on September 13, 1985. Claimant promptly reported his on-the-job injury and respondent stipulates that timely notice was received. However, respondent denies that claimant satisfied the requirements of K.S.A. 44-520a as to timely written claim, wherein it provides:

"K.S.A. 44-520a. **Claim for compensation; time limitation.** (a) No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident."

The first form E-1 Application for Hearing was filed January 17, 1989. This is obviously well beyond the two hundred (200) days from the date of accident, as contemplated in K.S.A. 44-520a, and even beyond the one (1) year provided for in K.S.A. 44-557(c) (Ensley). Claimant testified that he helped prepare and signed an accident report which was given to his supervisor, Larry Martin, shortly after his injury. However, the only accident report in evidence is Exhibit No. 1 to the deposition of John Gaska. That form, dated September 14, 1985, bears only the signature of Larry Martin. We find it does not satisfy the requirement for written claim. From the deposition testimony of William Powell, M.D., it appears that claimant's medical treatment for the September 13, 1985 injury ended at the latest when claimant last saw the authorized treating physician January 6, 1987, even disregarding respondent's allegation of a subsequent July 1986 accident. The last prescription given by Dr. Powell was filled by claimant on January 8, 1987. Thus, it appears compensation payments had been suspended more than one (1) year prior to the date claimant filed his form E-1 claim for compensation and Application for Hearing. There is in evidence as Gaska deposition Exhibit No. 24 a past due billing from Dr. Vinod N. Patel dated March 31, 1988, showing payment past due for services performed November 25, 1986. Subsequent payment of this bill by respondent or its workers compensation insurance carrier would clearly constitute payment of compensation within one (1) year of the filing of the form E-1, perhaps even within two hundred (200) days; although, the date of payment of this bill cannot be ascertained from the record. The record is replete with numerous bills for medical treatment, particularly pharmacy bills for prescriptions, which are file stamped received by the respondent within two hundred (200) days of the accident. These charges were understood to be for the September 13, 1985 work-related accident and were submitted for payment by the workers compensation insurance carrier. This was the testimony of both the claimant and his supervisor, John Gaska. Citing Ours v. Lackey, 213 Kan. 72, 515 P.2d 1071 (1973), the Administrative Law Judge found: "Written claim was timely made for claimant's accidental injury of September 13, 1985, in that prescription bills for claimant's medication prescribed by Dr. Powell were submitted to Essex and paid. Both claimant and respondent intended and recognized these to be claims for medical compensation and were treated as such." The Appeals Board agrees and finds timely written claim for compensation was served upon the employer.

(2) Application for Hearing was not timely filed. Claimant filed his Form E-1 Application for Hearing and Claim for Compensation with the Division of Workers Compensation on January 17, 1989. That application alleged a 1986 accident. It was subsequently amended March 31, 1989 to allege a September 13, 1985 accident. K.S.A. 44-534(b) (Ensley) provides:

"No proceeding for compensation shall be maintained under the workmen's compensation act unless an application for a hearing is on file in the office of the director within three (3) years of the date of the accident or within two

(2) years of the date of the last payment of compensation, whichever is later."

Clearly, an Application for Hearing was not filed within three (3) years of the September 13, 1985 accident. Whether it was filed within two (2) years of the last payment of compensation is less clear. The evidence shows that claimant on January 8, 1987 filled a prescription for Naprosyn which was given to him by Dr. Powell. Gaska deposition Exhibit No. 17 shows that the bill for that prescription was received by respondent January 29, 1987. Gaska Exhibit No. 18 shows that another bill for that prescription was received by respondent February 24, 1987. We can assume that payment was made subsequent to that date. In addition, there is the past due bill of Dr. Patel dated March 31, 1988 for services performed November 25, 1986. Claimant was referred to Dr. Patel by Dr. Powell, the authorized treating physician. However, Dr. Powell testified that he released claimant to return to his regular work without restrictions on October 3, 1985 following claimant's September 13, 1985 injury. He did not see claimant again for back complaints until July 21, 1986. At that time claimant gave a history of pain beginning four (4) days earlier on July 17, following an injury at work lifting propane bottles. The Administrative Law Judge found that claimant had an intervening accident in July 1986 and that the subsequent medical treatment, including the prescriptions and referral to Dr. Patel, were connected to the July 1986 rather than the September 1985 injury. We agree that the contemporaneous office notes of Dr. Powell lead to the conclusion of a subsequent intervening injury in July 1986. Therefore, claimant has failed in his burden of proving that Application for Hearing was filed within two (2) years of the date of the last payment of compensation for the September 13, 1985 accident. In so finding, the disputed issue regarding claimant's claim for permanent partial disability benefits is time barred by K.S.A. 44-534(b) (Ensley). The remaining issues raised by the parties in this docketed matter are rendered mute. Nevertheless, from the evidence presented we would agree with Finding 8 in the March 17, 1994 Award of the Administrative Law Judge that claimant has failed to sustain his burden of proving that he has sustained any work disability as a result of the September 13, 1985 accident and that there is no persuasive evidence that claimant has a measurable permanent impairment from that accidental injury. Dr. Powell released claimant following the September 13, 1985 injury without restrictions on October 3, 1985. He again released him without restrictions following the July 1986 injury on January 6, 1987. It was his opinion that as of January 6, 1987 claimant had no permanent impairment. The testimony of Dr. Shechter concerning impairment from the September 13, 1985 injury based upon his examination of claimant on August 16, 1991 is not persuasive and, by his own admission, does not take into consideration the possibility of a subsequent injury in 1986. Assuming a 1986 injury, Dr. Shechter admits that he cannot apportion his impairment rating as between the 1985 and the 1986 injuries. The testimony of Dr. Daniel Zimmerman concerning his functional impairment rating given on May 20, 1993 is not relevant to the September 13, 1985 injury.

The issue of costs will be addressed at the end of this Order with respect to docket numbers 133,155, 133,156 and 150,151. All three cases were tried together. It would be impossible to separate out costs for each specific docket number.

AWARD

WHEREFORE, it is the finding, decision and order of the Appeals Board that the March 17, 1994 Award by Administrative Law Judge James R. Ward should be, and is hereby, affirmed.

Docket No. 133,155

STIPULATIONS

1. Claimant met with personal injury by accident on October 10, 1988.
2. Claimant's accidental injuries arose out of and in the course of his employment with the respondent.
3. Respondent had notice of each accidental injury.
4. The relationship of employer and worker existed on the date of the accident.
5. The parties are covered by the Kansas Workers Compensation Act.
6. Respondent and insurance carrier, Travelers Insurance Company, admit written claim was timely made for the accidental injury of October 10, 1988.
7. Travelers Insurance Company had the workers compensation insurance coverage from and after February 17, 1988.
8. No compensation was paid for the claimed accidental injury of October 10, 1988. No additional dates of temporary total are claimed and no temporary partial disability compensation is claimed.
9. Medical treatment was furnished in connection with the 1988 accident, in the sum of \$4,544.14.
10. The Fund's liability has been stipulated to be 65% for the accidental injury of October 10, 1988.

ISSUES

Claimant appeals seeking review of the following issues:

- (1) Average weekly wage.
- (2) Costs assessed against claimant.

Respondent and Travelers Insurance Company and the Kansas Workers Compensation Fund appeal seeking review of whether the respondent and/or the Kansas Workers Compensation Fund is entitled to a credit pursuant to K.S.A. 44-510a (Ensley) for the September 13, 1985 accident and resulting disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(1) The parties have stipulated that claimant met with personal injury by accident on October 10, 1988. From the testimony, the Appeals Board finds that claimant was a full-time hourly worker earning \$8.47 per hour. There is testimony to the effect that claimant did work some overtime, but the evidence is insufficient for the Appeals Board to determine how much overtime claimant worked during the twenty-six (26) weeks next preceding his date of accident. Pursuant to K.S.A. 1988 Supp. 44-511(b)(4)(B), claimant's gross average weekly wage is found to be \$338.80 and his compensation rate \$225.88. This is determined by multiplying claimant's straight-time hourly rate of \$8.47 by an eight (8) hour day times five (5) days per week. Claimant argues that the number of days that he usually and regularly worked or was expected to work was six (6) rather than five (5) days per week. However, the Appeals Board finds that the claimant has failed to sustain his burden in this regard. From the evidence, it appears that claimant was expected to work five (5) days per week, and although he often worked more, we do not find from the evidence that such was expected, nor was it the usual and regular practice.

(2) Whether respondent and/or the Kansas Workers Compensation Fund is entitled to a credit pursuant to K.S.A. 44-510a (Ensley) for the 1985 accident. As set forth above, claimant was not found to have sustained a permanent impairment as a result of his September 13, 1985 accident; hence, no permanent partial disability compensation was awarded. As such, claimant neither received nor is there collectible disability compensation for the September 13, 1985 personal injury by accident. Therefore, the Appeals Board finds that neither respondent nor the Kansas Workers Compensation Fund is entitled to any reduction in compensation for the permanent partial disability awarded in this case as a result of a prior disability. There being no prior disability, they could not contribute to the overall disability found to exist following the October 10, 1988 injury.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward dated March 17, 1994 should be, and hereby is, affirmed. The findings and analysis of the Administrative Law Judge are correct and are adopted by the Appeals Board for the review. The Appeals Board adopts the orders of the Administrative Law Judge, except those regarding costs, which issue will be addressed subsequently for all three docketed claims.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gerald T. Brown, and against the respondent, Essex Group, Inc., and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred October 10, 1988 and based upon an average weekly wage of \$338.80, for 415 weeks at the rate of \$22.59 per week in the sum of \$9,374.85 for a 10% permanent partial general body impairment of function. Pursuant to stipulation, the Kansas Workers Compensation Fund shall be liable for sixty-five percent (65%) of the cost of this Award, except as the payment of the costs which are hereafter discussed and ordered paid.

As of July 11, 1995 there is due and owing claimant 352.14 weeks of permanent partial disability compensation at the rate of \$22.59 per week in the sum of \$7,954.84, which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of \$1,420.01 is to be paid for 62.86 weeks at the rate of \$22.59 per week, until fully paid or further order of the Director.

STIPULATIONS

Docket No. 150,151

1. Claimant met with personal injury by accident June 28, 1990.
2. Claimant's accidental injury arose out of and in the course of his employment with the respondent.
3. Respondent had notice of accidental injury.
4. The relationship of employer and worker existed on the date of the accident.
5. The parties are covered by the Kansas Worker Compensation Act.

6. Respondent and Travelers Insurance Company admit written claim was timely made for the accidental injury of June 28, 1990.
7. Travelers Insurance Company had the workers compensation insurance coverage from and after February 17, 1988.
8. No compensation was paid for the June 28, 1990 claimed accidental injury. No temporary total is claimed and no temporary partial disability compensation is claimed.
9. Medical treatment was furnished in connection with the 1990 accident, in the sum of \$1,735.87.
10. The Fund's liability has been stipulated in Docket No. 150,151 to be 65% for this claimed accident.

ISSUES

Claimant appeals seeking review of the following issues:

- (1) Average weekly wage.
- (2) Costs assessed against claimant.

Respondent and Travelers Insurance Company and the Kansas Workers Compensation Fund appeal seeking review of whether the respondent and/or the Kansas Workers Compensation Fund is entitled to a credit pursuant to K.S.A. 44-510a (Ensley) for the prior accident and resulting disability.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

- (1) The parties have stipulated that claimant met with personal injury by accident on June 28, 1990. From the testimony, the Appeals Board finds that claimant was a full-time hourly worker earning \$8.27 per hour. There is testimony to the effect that claimant did work some overtime, but the evidence is insufficient for the Appeals Board to determine how much overtime claimant worked during the twenty-six (26) weeks next preceding his date of accident. Pursuant to K.S.A. 1989 Supp. 44-511(b)(4)(B), claimant's gross average weekly wage is found to be \$330.80. This is determined by multiplying claimant's straight-time hourly rate of \$8.27 by an eight (8) hour day times five (5) days per week. Claimant argues that the number of days that he usually and regularly worked or was expected to work was six (6) rather than five (5) days per week. However, the Appeals Board finds that the claimant has failed to sustain his burden in this regard. From the evidence it appears

that claimant was expected to work five (5) days per week, and although he often worked more, we do not find from the evidence that such was expected, nor was it the usual and regular practice.

(2) Is the respondent and/or the Kansas Workers Compensation Fund entitled to a one hundred percent (100%) credit pursuant to K.S.A. 44-510a (Ensley) for the October 10, 1988 accident? The Appeals Board finds respondent and the Fund are entitled to a one hundred percent (100%) credit. We affirm and adopt the finding of the Administrative Law Judge.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge James R. Ward dated March 17, 1994 is modified as follows:

The costs for docket numbers 133,155, 133,156 and 150,151 are to be paid one-third ($\frac{1}{3}$) by the respondent and Liberty Mutual Insurance Company, one-third ($\frac{1}{3}$) by respondent and Travelers Insurance Company and one-third ($\frac{1}{3}$) by the Kansas Workers Compensation Fund. Otherwise, in docket number 150,151, the Appeals Board affirms and adopts all other orders contained in the Award of Administrative Law Judge James R. Ward dated March 17, 1994 not inconsistent with the findings herein.

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Gerald T. Brown, and against the respondent, Essex Group, Inc., and its insurance carrier, Travelers Insurance Company, for an accidental injury which occurred on June 28, 1990 and based upon an average weekly wage of \$330.80, for 325.43 weeks of compensation, at the reduced rate of \$10.49 per week, in the sum of \$3,413.76, and 89.57 weeks of compensation, at the unreduced rate of \$33.08 per week, in the sum of \$2,962.98, making a total award of \$6,376.74, for a 15% permanent partial disability to the body as a whole, as a result of the accidental injury of June 28, 1990. Pursuant to the stipulation between the respondent and the Kansas Workers Compensation Fund, the Kansas Workers Compensation Fund shall be liable for sixty-five percent (65%) of the cost of this Award, except as to the payment of costs.

As of July 11, 1995, there is due and owing claimant 262.71 weeks of compensation at the reduced rate of \$10.49 per week or \$2,755.83 which is ordered paid in one lump sum, less any amounts previously paid. The remaining balance of \$3,620.91 is to be paid for 62.72 weeks at the reduced rate of \$10.49 per week in the sum of \$657.93, followed

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**DOCKET NOS. 133,155
133,156
150,151**

by 89.57 weeks at the unreduced rate of \$33.08 per week, in the sum of \$2,962.98, until fully paid or further order of the Director.

IT IS SO ORDERED.

Dated this ____ day of July 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: John J. Bryan, Topeka, KS
James C. Wright, Topeka, KS
Bret C. Owen, Topeka, KS
James B. Biggs, Topeka, KS
James R. Ward, Administrative Law Judge
David Shufelt, Acting Director